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JURISDICTION

The judgment of the District Court was entered January 5, 1925. (R. 8.) A writ of error was allowed on March 27, 1925 (R. 14), under Section 242 of the Judicial Code and Section 4 of the Tucker Act, Act of March 3, 1887, c. 359, 24 Stat. 505, 506 (both of which have since been repealed by the Act of February 13, 1925, c. 229, 43 Stat. 936, 941, 942). See *J. Homer Fritch, Inc.*, v. *United States*, 248 U. S. 458.

STATEMENT

This action was instituted by a complaint filed by the defendant in error in the District Court for the District of Colorado and is for the recovery from the United States of the sum of $571.26 paid to the United States by the First National Bank, of Denver, Colorado, as interest at the rate of two per cent per annum upon a sum of money which was deposited by the defendant in error in the registry of said court and by the clerk of said court deposited in said bank, and which sum of money was subsequently returned to the defendant in error. The case was disposed of in the District Court on a motion by the plaintiff for judgment on the pleadings. The court granted the motion and on January 5, 1925, entered judgment that the defendant in error recover the amount claimed in the complaint. (R. 8.)

In June, 1918, the defendant in error was a party to an action in the District Court of the

United States for the District of Colorado, and in the course thereof deposited with the clerk of the court to await the outcome of the action the sum of $15,143.92, which the clerk immediately deposited with the First National Bank of Denver, Colorado. At the termination of the litigation the fund was returned to the defendant in error. (R. 1, 15.)

The First National Bank had been theretofore designated by the court as one of its depositaries (R. 1, 15), and had also been designated as a Government depositary by the Secretary of the Treasury (R. 5, 15).

In May, 1913, the Secretary of the Treasury promulgated certain regulations which required all Government depositaries to pay two per cent interest to the Treasury of the United States on all Government deposits, including court funds, and the First National Bank agreed to pay such interest. (R. 5–7, 15.) Interest at the rate of two per cent on the sum of $15,143.92 during the period it was deposited, amounting in all to $571.26, was actually paid by the First National Bank to the Treasury of the United States. (R. 5, 15.)

The District Court took judicial notice "of its own relations with the bank, and the fact that a contract for interest existed between its clerk and the bank in question, for the payment of interest agreeable to rule 20, and that the same was paid to him up to the time the arrangement was interfered with by the arbitrary and unauthorized action of

the Secretary of the Treasury in promulgating the regulations referred to." (R. 16.) The court concluded that the defendant in error was entitled to recover from the Government the $571.26 paid to it as interest. (R. 16.)

Rule XX of the District Court is as follows:

> 1. All moneys brought into court shall be paid to the clerk of the court, unless the court shall otherwise direct, and when not immediately paid to the party entitled, be deposited by said clerk, in his name of office, with such depositary as may be designated by law, or by the court, when no place is so designated. The amount so received, the purpose for which it was paid into court, together with the fact of the deposit, as herein provided, shall be noted by the clerk in the civil or criminal dockets of the court in the particular cause in which it is received. All interest paid on said deposits shall become a part thereof.
>
> 2. Orders on depositaries for the payment of money from the registry of the court shall be signed by the clerk, and countersigned by a judge of the court.
>
> 3. The First National Bank of Denver, The Colorado National Bank of Denver, and The Denver National Bank of Denver are made depositaries for such funds.

The Treasury Regulations in force from June, 1918, to May, 1920, are printed in the Appendix.

Section 5153 of the Revised Statutes, as amended by various later acts, under which the Treasury

Regulations above referred to were issued, is as follows:

> All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositaries of public money and financial agents of the Government, as may be required of them. The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safekeeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government: *Provided*, That the Secretary shall, on or before the first of January of each year, make a public statement of the securities required during that year for such deposits. And every association so designated as receiver or depositary of the public money shall take and receive at par all of the national currency bills, by whatever association issued, which have been paid into the Government for internal revenue, or for loans or stocks: *Provided*, That the Secretary of the Treasury shall distribute the deposits herein provided for, as far as practicable, equitably between the different States and sections.

Section 995 of the Revised Statutes is as follows:

> All moneys paid into any court of the United States, or received by the officers thereof, in any cause pending or adjudicated in such court, shall be forthwith deposited with the Treasurer, an assistant treasurer, or a designated depositary of the United States, in the name and to the credit of such court: *Provided,* That nothing herein shall be construed to prevent the delivery of any such money upon security, according to agreement of parties, under the direction of the court.

The answer of the plaintiff in error alleged that in consideration for the payment by the First National Bank of the interest, aggregating $571.26, the plaintiff in error, among other things, kept safe in its custody the collateral security pledged by the bank to secure the deposit and supervised the depositary in all matters in connection with the deposit and the keeping thereof in the depositary. (R. 6.)

SPECIFICATION OF ASSIGNED ERRORS TO BE URGED

The District Court erred in holding that the United States was not entitled to interest on deposits of court funds and in holding that it had jurisdiction.

SUMMARY OF ARGUMENT

I. The regulation or contract under which the First National Bank paid interest to the United States was a valid regulation pursuant to Section

5153 of the Revised Statutes. A depositary of public money designated pursuant to that section automatically becomes an authorized depositary of court funds under Section 995 of the Revised Statutes, and regulations issued under the former section should therefore provide for court funds as well as for public money.

II. The claim of the defendant in error is one of which the District Court had no jurisdiction. There was no contract, express or implied in fact, by the plaintiff in error to pay over to the defendant in error the interest received by it; the claim of the defendant in error, if any, is one upon a contract implied in law, for which the Tucker Act does not give a right of action against the United States.

ARGUMENT

I

THE REGULATION OR CONTRACT UNDER WHICH THE FIRST NATIONAL BANK PAID INTEREST TO THE UNITED STATES IS VALID

Section 5153 of the Revised Statutes, as amended, provides that "All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, under such regulations as may be prescribed by the Secretary * * *." The District Court held that this section refers only to public moneys, so is not in point, since moneys paid into court in causes pending therein and de-

posited in a designated depositary of the United States by the clerk are not public moneys. (R. 15.)

It is true that the only power of designation given to the Secretary of the Treasury by the section is that of designating depositaries of public money. But it does not follow that the regulations which the Secretary of the Treasury may prescribe are limited to such as are necessary to protect the public moneys deposited and can not take into consideration other conditions which arise by virtue of a designation as a depositary of public moneys.

Section 995 of the Revised Statutes requires money paid into any court of the United States to be deposited with the Treasurer, an Assistant Treasurer, or a designated *depositary of the United States*, with the proviso that such money may be delivered upon security, according to agreement of parties under the direction of the court. The words "depositary of the United States" must mean a depositary of public money. Therefore, while the Secretary of the Treasury can not directly designate a depositary of court funds, his designation of a depositary of public money will automatically, by virtue of Section 995, make the national banking association so designated also an authorized depositary of court funds.

Under these circumstances the regulations prescribed by the Secretary of the Treasury pursuant

to Section 5153 should provide for the handling and protection of court funds deposited with designated depositaries of public money, as well as for the handling and protection of public money. Consequently, the plaintiff in error kept safe collateral security deposited with it to secure the deposit of the court funds with the First National Bank, and supervised the bank in all matters in connection with the deposit and the keeping thereof. (R. 6.) That in connection with the performance of this service it required the payment of interest to it at the rate of two per cent does not seem to be unreasonable or beyond the power of the Secretary of the Treasury under Section 5153. This requirement did not prevent the court, or the parties to the litigation, from making such arrangements for additional interest as they were able. No banking association was compelled to accept a designation as a depositary of public money upon the terms fixed by the Secretary of the Treasury. And if the parties or the court did not desire to take advantage of the facilities offered by the Treasury Department in the designation and regulation of a depository of public money, they could probably have agreed to deliver the money deposited in court on security, pursuant to the proviso to Section 995.

It seems, therefore, that the requirement by the Treasury Department that the First National Bank pay the United States interest at the rate of two per cent upon the court funds deposited with

it was a reasonable regulation and within the authority granted by Section 5153 of the Revised Statutes.

In the consideration of these regulations the thought suggests itself that they may be construed so as to permit the payment of interest to a litigant whose money is deposited for safe-keeping, and that the requirement that interest on "court funds" be paid to the United States was not intended to relate to the funds of litigants so deposited. The Treasury Department has construed them to cover such funds and we have accordingly dealt with the case on that basis.

II

THE CLAIM OF THE DEFENDANT IN ERROR IS NOT ONE OF WHICH THE DISTRICT COURT HAD JURISDICTION

The only justification for bringing this case to this Court is to obtain a decision on the question whether the Treasury regulation is valid which requires payment to the United States of interest on deposits of court funds. We desire to waive every other point in the case which properly may be waived.

There is a question whether, in any view of the case, the defendant in error could do more than recover interest from the bank. That point is laid aside.

There is a question of jurisdiction of the District Court, however, which may not be waived.

It is clear that there was no contract, express or implied in fact, by the plaintiff in error to pay over to the defendant in error the interest received on the $15,143.92 deposited in the First National Bank. The Treasury regulation requiring payment to the Treasury of interest on Government deposits, including court funds, was for the benefit of the United States, not for the benefit of the persons ultimately found to be entitled to the funds deposited. This was expressly held in *Chatham & Phenix National Bank* v. *Guaranty Trust Co.* (C. C. A. 2nd Circuit), 256 Fed. 90, certiorari denied 250 U. S. 642, in which the court speaking of the regulation in question, said (p. 92):

> The contention that this regulation or contract does not contemplate the payment of the interest to the United States, but to whomsoever it may be due, does not impress us. Obviously the Secretary of the Treasury requires payment of it to him and the United States attorney appears in this case as amicus curiae, contending that the interest does belong to the United States.

In the District Court the defendant in error did not contend that there was any contract, express or implied in fact, under which it was entitled to the interest in question, but based its claim upon the proposition that " where one has received money which in equity and natural justice belongs to the plaintiff he may maintain a suit therefor, as upon

an implied contract, and it is not necessary that there be any actual contractual relation." The District Judge based his decision upon his conclusion that there was a contract between the clerk of the court and the bank for the payment of interest; that this arrangement " was interfered with by the arbitrary and unauthorized action of the Secretary of the Treasury in promulgating the regulations referred to "; and that " the Government, due to a mistake of law, has received something which in equity and good conscience belonged to the plaintiff." (R. 16.) The theory of both the defendant in error and the District Judge was that as the Government had improperly received money to which it was not entitled, recovery could be had upon a contract implied in law.

This view entirely disregards the settled rule that " to give the Court of Claims jurisdiction the demand sued on must be founded on a convention between the parties—'a coming together of minds.' " *Russell* v. *United States*, 182 U. S. 516, 530.

A case very similar to the present one is *Merritt* v. *United States*, 267 U. S. 338. There the Court said (p. 340):

> Plaintiff can not recover under the Tucker Act, Judicial Code, §145, 24 Stat. 505. The petition does not allege any contract, express or implied in fact, by the Government with the plaintiff to pay the

> latter for the khaki on any basis. Nor does it set forth facts from which such a contract will be implied. The pleader may have intended to sue for money had and received. But no facts are alleged which afford any basis for a claim that the repayment made by the Mills was exacted by the Government for the benefit of the plaintiff. The Tucker Act does not give a right of action against the United States in those cases where, if the transaction were between private parties, recovery could be had upon a contract implied in law.

See also *Pearson* v. *United States*, 267 U. S. 423.

In the complaint the defendant in error alleged that the cause was founded upon a regulation of an executive department of the United States Government. (R. 1.) This is a mere conclusion which finds no support in the facts. A claim is not founded upon a law or a regulation of an executive department within the meaning of the Tucker Act unless the law or the regulation itself creates the obligation. See *Campbell* v. *United States*, 107 U. S. 407; *Hooe* v. *United States*, 218 U. S. 322; *United States* v. *Hvoslef*, 237 U. S. 1; *United States* v. *Laughlin*, 249 U. S. 440; *Great Western Serum Company* v. *United States*, 254 U. S. 240. The claim in the present case, far from being founded on the Treasury regulation requiring the payment of interest, is founded upon the asserted invalidity of that regulation.

CONCLUSION

The judgment of the District Court should be reversed.

WILLIAM D. MITCHELL,
Solicitor General.

GARDNER P. LLOYD,
Special Assistant to the Attorney General.

MAY, 1926.